BRB No. 09-0679 BLA

FENTON L. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 08/31/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order on Reconsideration of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale , Illinois, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order on Reconsideration (2006-BLA-05118) of Administrative Law Judge Adele H. Odegard issued with respect to a subsequent claim filed on August 25, 2004,[1] pursuant to

[1] Claimant filed a prior claim on June 6, 1984, which was denied by Administrative Law Judge Alfred Lindeman on June 5, 1987, because, while claimant established the existence of pneumoconiosis, the evidence was insufficient to establish

the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] Director's Exhibit 3. In a Decision and Order dated March 4, 2009, the administrative law judge credited claimant with at least 40.3 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Based on her consideration of the claim on the merits, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (4), 718.203(b). The administrative law judge further found, however, that the evidence was insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On March 31, 2009, claimant filed a timely motion for reconsideration. The administrative law judge denied claimant's motion in a Decision and Order on Reconsideration issued on May 18, 2009.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief addressing the merits of claimant's entitlement.[3]

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total disability due to pneumoconiosis. Director's Exhibit 1. Claimant took no action with regard to the denial, until he filed his current subsequent claim on August 25, 2004. Director's Exhibit 3.

[2] The Director, Office of Workers' Compensation Programs, and employer correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as claimant's original and subsequent claims were both filed before January 1, 2005. Director's Exhibits 1, 3.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of at least 40.3 years of coal mine employment, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge erred in finding that the evidence was insufficient to establish that he is totally disabled due to pneumoconiosis. Based on our review of the administrative law judge's two decisions, the briefs of the parties, and the evidence of record, we conclude that the denial of benefits must be vacated and the case remanded for further consideration.

In addressing the issue of disability causation pursuant to 20 C.F.R. §718.204(c), the administrative law judge weighed the opinions of Drs. Rasmussen, Houser, Zaldivar and Rosenberg.[5] Dr. Rasmussen conducted an examination of claimant, at the request of the Department of Labor (DOL), on November 24, 2004, and signed his report (Form CM-988) on January 2, 2005. Director's Exhibit 10. The objective test results attached to his report consisted of an x-ray and an arterial blood gas study dated November 24, 2004, and a pulmonary function study dated January 25, 2005.[6] Dr. Rasmussen noted

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[5] Employer submitted the results of pulmonary function and arterial blood gas testing obtained by Dr. Crissali on January 16, 2006, but did not submit a written medical report from him. Decision and Order at 10 n.19. The administrative law judge found that while Dr. Crissali indicated that claimant had a restrictive impairment, he did not address its etiology. *Id*. at 22 n.36.

[6] The pulmonary function study was signed by Dr. Rasmussen and interpreted as showing "Minimal, irreversible restrictive ventilatory impairment. Total lung capacity and residual volumes are minimally reduced. Single breath carbon monoxide diffusing capacity is minimally reduced." Director's Exhibit 10.

that the x-ray was positive for pneumoconiosis, and that pulmonary function testing showed "moderately severe, significantly reversible restrictive impairment." *Id*. Dr. Rasmussen noted with respect to the arterial blood gas testing, that claimant had minimal resting hypoxemia and that his oxygen transfer was essentially normal. However, following an incremental treadmill exercise, he noted that claimant's "volume of ventilation was markedly increased" and that claimant had "significant ventilatory limitations to exercise." *Id*. Dr. Rasmussen diagnosed coal worker's pneumoconiosis, based on claimant's length of coal mine employment and the positive x-ray findings, and further indicated that the x-ray showed an elevated right diaphragm, of unknown origin. He opined that claimant has "at least moderate loss of lung function" and is totally disabled. In discussing the etiology of claimant's respiratory impairment, Dr. Rasmussen stated:

> There is [sic] several possible causes of [claimant's] disabling lung disease. [Claimant] has an elevated right hemidiaphragm, which could result in some loss of lung volume. The patient has hyperactive airways disease as noted by his improvement after bronchodilator therapy. Airway disease certainly results from coal mine dust exposure. He could also have an element of hyperactive airways disease, the latter according to Dutch hypotheses suggests common pathways for [chronic obstructive pulmonary disease] including allergic and environmental influences including coal mine dust exposure. ([Claimant's] diaphragmatic impairment could be the consequence of previous trauma including possibly [a] neck injury from shrapnel wound). [Claimant's] coal mine dust exposure is a significant contributing factor to his loss of lung function. . . . [Claimant] has both clinical and legal pneumoconiosis.

Id. Dr. Rasmussen concluded that coal dust exposure was a significant contributing factor to the loss of claimant's lung function and his resulting disability.

Dr. Zaldivar examined claimant on April 13, 2005, and prepared a report dated May 9, 2005. Director's Exhibit 12. Based on the pulmonary function study results, Dr. Zaldivar diagnosed that claimant suffered from a moderate and irreversible restrictive respiratory impairment. He opined that claimant's restrictive respiratory impairment is disabling "only because it adds to the other impairments, namely claimant's coronary artery disease and advanced age." *Id*. In addressing the etiology of the restriction, Dr. Zaldivar noted that "simple coal workers' pneumoconiosis does not cause a restrictive impairment." *Id*. He opined that claimant was disabled as the result of "either congestive heart failure with a pleural effusion or abnormal function of the right hemidiaphragm due to phrenic nerve damage[,] which may be idiopathic." *Id*.

Dr. Houser reviewed various medical records and prepared a report dated October 29, 2007. Claimant's Exhibit 4. He diagnosed coal workers' pneumoconiosis, based on

an x-ray, and noted that claimant had never smoked. Dr. Houser also noted that claimant had persistent findings of hypoxemia and that at least four sets of pulmonary function studies showed a total lung capacity of between fifty-five and sixty-three percent of predicted. Dr. Houser indicated that obesity was not a factor in claimant's respiratory disability. Dr. Houser opined that, while claimant's elevated right hemidiaphragm was contributing to his respiratory impairment, coal dust exposure was also a contributing factor, and explained:

> The right lung normally contributes 55% of total lung capacity, and the left lung 45%. If an individual lost 1/3 to 1/2 of their function on the right side due to an elevated diaphragm, their total lung capacity would still be between 72.5% of predicted and 81.3% of predicted. In [claimant's] case, the numbers are substantially lower than this, indicating that the elevated diaphragm is not the [sole] explanation for the loss in pulmonary function.

Id. Dr. Houser further noted that, claimant is not a smoker and because the exercise study performed by Dr. Rasmussen demonstrated moderately severe limitation of ability to exercise, it was his opinion that "the evidence clearly shows that [claimant] has a disabling respiratory impairment due to his coal workers' pneumoconiosis, restrictive ventilatory impairment and associated hypoxemia." *Id*.

In a supplemental report dated July 18, 2008, Dr. Zaldivar indicated that only a CT scan would reveal whether claimant had a large pleural effusion present or an elevated diaphragm. He noted that, "the fact that the diffusion capacity is low [indicates that] the lungs are not exchanging oxygen well[,] since the diffusion is needed to exchange oxygen from the air spaces to the blood spaces (capillaries) of the lungs. In this case, clearly, oxygen exchange is perfectly normal in spite of the very low diffusion capacity." Employer's Exhibit 5. He explained that "diffusion capacity is reduced in the same proportion as total lung capacity" and, in light of the normal blood gas studies, it was reasonable to conclude that claimant's reduction in diffusion capacity and his restriction were unrelated to any respiratory impairment. *Id*. Dr. Zaldivar noted once again that, any assertion that coal workers' pneumoconiosis causes a restrictive impairment is "patently incorrect" and concluded, therefore, that claimant's restriction is attributable to either a pleural effusion or an elevated diaphragm. *Id*.

In a supplemental report dated November 3, 2008, Dr. Zaldivar reviewed Dr. Houser's September 16, 2008 report and criticized Dr. Houser for predicting the total lung capacity of an individual with either a paralyzed or elevated diaphragm by "using a simple mathematical equation of his own devising." Employer's Exhibit 6. Dr. Zaldivar reiterated his opinion that claimant's normal blood gases are evidence that "the lungs themselves are not damaged but rather are compressed by [his] high diaphragm plus pleural effusion that was present." *Id*.

In a report dated July 15, 2008, Dr. Rosenberg reviewed the medical records and the reports of Drs. Rasmussen, Houser and Zaldivar. Employer's Exhibit 4. He stated that "it can be appreciated that overall [claimant] likely has a mild degree of micronodularity consistent with a degree of simple coal workers' pneumoconiosis . . . [these] abnormalities were dated as far back as 1984 and have been associated with a normal exercise oxygenation response." *Id*. Citing a medical study, Dr. Rosenberg noted that "gas exchange in association with exercise is probably the best way to assess the presence or absence of chronic interstitial scarring." *Id*. With respect to claimant's case, Dr. Rosenberg opined that since claimant demonstrated a normal oxygenation response with exercise, and he had a normal diffusing capacity, the interstitium within his lungs was not chronically scarred, suggesting that his restrictive impairment was "'extrinsic' in nature, unrelated to factors adversely affecting the lung parenchyma." *Id*. He opined that from a functional standpoint, claimant has a moderate degree of restriction based on his reduced total lung capacity and is totally disabled. *Id*. Addressing the etiology of claimant's restriction, he noted that "while there is no question that restriction can be caused by clinical CWP, it would be expected to be associated with extensive interstitial opacities and the likely presence of progressive massive fibrosis" and represent "intrinsic" restriction. Noting that claimant has had no progression of his interstitial opacities, Dr. Rosenberg opined that that it was "not logical" to conclude that claimant's restriction was related to coal workers' pneumoconiosis. *Id*. Referencing a medical article, Dr. Rosenberg concluded that claimant's degree of restriction is "consistent with what has been [] reported in the medical literature regarding unilateral diaphragmatic paralysis and resultant impairment." *Id*.

In a supplemental report dated September 16, 2008, Dr. Houser reviewed the July 18, 2008 report of Dr. Zaldivar. Dr. Houser disagreed with Dr. Zaldivar's assertion that the blood gas study evidence was normal, noting that there were three arterial blood gas tests that showed hypoxemia: Dr. Rasmussen's resting and exercise studies of November 24, 2004, and the resting study of January 16, 2006. Claimant's Exhibit 5. In response to questions posed by claimant's counsel, Dr Houser stated that claimant has an elevated right hemidiaphragm (eventration), which was diagnosed in an x-ray report by the Huntington, West Virginia Medical Center, and that "[t]here is no evidence that he has a paralyzed diaphragm" as described in the medical literature cited by Dr. Rosenberg. *Id*. He explained that eventration is similar to a hernia, with some impairment but "less than that of a paralyzed diaphragm." *Id*. According to Dr. Houser, because claimant's pulmonary function is in the range of fifty-five percent of predicted, "this is the equivalent to losing the entire function" of one lung. *Id*. Dr. Houser reiterated his opinion that claimant "has clear evidence of a disabling respiratory impairment due to coal workers' pneumoconiosis, which caused his restrictive ventilatory impairment and associated hypoxemia." *Id*.

In weighing the conflicting medical opinions as to the etiology of claimant's disability at 20 C.F.R. §718.204(c), the administrative law judge noted that Dr.

Rasmussen diagnosed a moderately reversible impairment based on the results of a pulmonary function study dated November 24, 2004, which is not of record.[7] Decision and Order at 24 n. 36. She also considered Dr. Rasmussen's explanation, that claimant's disability was due to coal dust exposure in light of his *reversible* restriction, to be insufficiently explained as it was inconsistent with the pulmonary function study attached to Dr. Rasmussen's report, dated January 25, 2005, which was interpreted as showing an *irreversible* restrictive impairment. *Id*. at 24. Thus, the administrative law judge found that Dr. Rasmussen's opinion regarding the etiology of claimant's pulmonary impairment was "not well-reasoned" and gave it "little weight." *Id*. at 25.

With respect to Dr. Zaldivar, the administrative law judge found that, insofar as Dr. Zaldivar believes that pneumoconiosis does not cause a restrictive impairment, his opinion is "inconsistent with regulatory guidance [20 C.F.R. §718.201], which states that pneumoconiosis can cause either restrictive or obstructive pulmonary disease." Decision and Order at 26. The administrative law judge concluded, therefore, that Dr. Zaldivar's opinion was "not well-reasoned" and gave it "little weight" on the issue of disability causation. *Id*.

The administrative law judge noted that Dr. Houser disagreed with Dr. Rosenberg that the right diaphragm problem could account for the entirety of claimant's respiratory impairment. He found that, while Dr. Houser did not cite to any authority for his mathematical calculations regarding the amount of loss in lung function that could be attributable to claimant's diaphragmatic condition, his "overall conclusion - that [claimant's] impairment must be due in part to his pneumoconiosis because it cannot be due completely to his diaphragm – is supported by medical evidence" and was well-reasoned. Decision and Order at 27. However, the administrative law judge concluded that Dr. Houser's opinion was insufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.204(c), as it "does not resolve the ultimate issue, because it does not establish, or even assert, that the claimant's pneumoconiosis is a 'substantially contributing cause' of the impairment, as the regulation demands." *Id.* at 27. According to the administrative law judge, "the most that can be said for Dr. Houser's opinion is that claimant's condition is caused by two factors, and he disagrees with the other physicians that non-coal mine employment related factors, such as the hemidiaphragm problem, can account for all, or mostly all, of [claimant's] impairment." *Id*. The administrative law judge denied benefits finding, that "there is no well-reasoned opinion that concludes that

[7] The administrative law judge noted that "[t]he pulmonary function study was apparently re-administered on January 25, 2005. The record does not explain why this pulmonary function study was administered two months after the other tests, or what happened to the original pulmonary function study [of November 24, 2004]." Decision and Order at 10 n.18.

[claimant's] pneumoconiosis is a substantially contributing cause of [his] pulmonary disability." *Id*.

On reconsideration, claimant asserted that, because there is no requirement that a miner must prove the amount of pneumoconiosis contribution to the totally disabling impairment, the administrative law judge erred in his treatment of Dr. Houser's opinion. Claimant asserted that, insofar as Dr. Houser opined that pneumoconiosis was one of two causes for claimant's disability, his opinion was sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c).

The administrative law judge denied reconsideration, noting that while claimant's motion discussed the requirements for determining whether a physician's opinion was sufficient to establish disability causation, claimant did not specifically address her weighing of the conflicting evidence and the rationale she provided for crediting Dr. Rosenberg's opinion. The administrative law judge stated that she was "not persuaded that Dr. Houser's algorithm for determining the amount of lost lung function is accurate, because it is not supported by any medical authority." Decision and Order on Reconsideration at 3. She concluded that it "was not fully documented as the regulation requires, and so it is entitled to less weight." *Id*. The administrative law judge further stated that Dr. Rosenberg provided a reasoned and documented opinion, "based on objective data and observed findings," explaining why claimant's degree of restrictive impairment "is consistent with what would be seen based on a nonfunctional (or paralyzed) right diaphragm." *Id*. at 3. Therefore, the administrative law judge again found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Initially, we reject claimant's assertion that the administrative law judge erred in giving less weight to Dr. Rasmussen's opinion. As noted by the administrative law judge, Dr. Rasmussen cited to improvement after bronchodilator as the basis for his finding that claimant's restriction was reversible and, therefore, due to coal dust exposure. However, the pulmonary function study upon which Dr. Rasmussen relied to support his opinion is not of record, and the January 25, 2005 pulmonary function test, attached to his written opinion, was specifically interpreted by Dr. Rasmussen as showing *irreversible* restrictive impairment, with no significant response to bronchodilator. Because Dr. Rasmussen did not address, in his written opinion, the results of the pulmonary function study attached to his report, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion is insufficiently reasoned and entitled to little weight pursuant to 20 C.F.R. §718.204(c). *See United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

Nevertheless, we agree with claimant that the administrative law judge applied an inconsistent standard in weighing the conflicting evidence and failed to adequately explain the basis for her decision to credit Dr. Rosenberg's opinion, that claimant's

restriction is unrelated to coal dust exposure, over the contrary opinion of Dr. Houser, that claimant's disabling restriction is due, at least in part, to coal dust exposure. The first reason cited by the administrative law judge for giving Dr. Houser's opinion less weight is not affirmable. Although Dr. Houser did not specifically state that pneumoconiosis was "a substantially contributing cause" of claimant's respiratory disability, the doctor's failure to use those specific words does not preclude reliance on his opinion.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000),[8] a miner must prove, by a preponderance of the evidence, that his pneumoconiosis was "at least a contributing cause of his totally disabling respiratory impairment." *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). In *Robinson*, the Fourth Circuit indicated that substantial evidence would support an award of benefits based on a physician's opinion that the miner's "disability was consistent with occupational pneumoconiosis." *Robinson*, 914 F.2d at 36; 14 BLR at 2-71-72.

The revised regulation at 20 C.F.R. §718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). In promulgating this revised regulation, the DOL explained:

> The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

> Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word "material" to §718.204(c)(i) and "materially" to §718.204(c)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals.

65 Fed. Reg. 79,946 (2000).

The Fourth Circuit recently held that "the regulations do not require any particular objective values [to establish total disability due to pneumoconiosis]. All that is required is that pneumoconiosis have a material adverse effect on the miner's condition." *Hobet Mining, Inc. v. Terry*, 219 Fed.Appx. 310, 314, 2007 WL 446680 **4 (4th Cir. Feb. 8, 2007) (unpub.). Thus, contrary to the administrative law judge's analysis, a physician's opinion, that claimant's coal dust exposure adversely affected his respiratory condition, or that it worsened or caused a deterioration of a totally disabling (non-occupationally related) respiratory or pulmonary impairment, will support a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See* 20 C.F.R. §718.201; 65 Fed. Reg. 79937, 79948.

In this case, Dr. Houser stated that claimant has "clear evidence of a disabling respiratory impairment due to coal workers' pneumoconiosis" and explained why he disagreed with Dr. Rosenberg's opinion, that claimant's elevated diaphragm was responsible for the totality of his restrictive respiratory impairment. Claimant's Exhibit 4. Therefore, contrary to the administrative law judge's finding, Dr. Houser's opinion, if reasoned and documented, is legally sufficient to support a finding that claimant is totally disabled due to pneumoconiosis.

The administrative law judge's second reason for rejecting Dr. Houser's opinion is also invalid. In denying claimant's reconsideration request, the administrative law judge explained that she gave less weight to Dr. Houser's opinion because she was "not persuaded that Dr. Houser's algorithm for determining the amount of lost lung function is accurate, because it is not supported by any medical authority." Decision and Order on Reconsideration at 3, *citing* Decision and Order at 27. Thus, she concluded that Dr. Houser's opinion was not "fully documented" and entitled to less weight. In contrast, the administrative law judge noted that Dr. Rosenberg's opinion cited medical authority for his conclusion, "that claimant's degree of restrictive impairment is consistent with what would be seen based on a non-functional (or paralyzed) right diaphragm." Decision and Order at 27. She specifically found on reconsideration that "Dr. Rosenberg's opinion on this discrete issue" is entitled to controlling weight, as it is based on "objective data and observed findings." Decision and Order on Reconsideration at 3.

Because Dr. Houser is a Board-certified pulmonary expert, we agree with claimant that it was unreasonable for the administrative law judge to conclude that Dr. Houser's opinion was *not fully documented* on the ground that he did not cite to a specific medical authority for his calculation "concerning the percentage of lung capacity each side of the lung contributes, which no other expert disputes."[9] Claimant's Brief in Support of Petition for Review at 10. Moreover, the administrative law judge did not apply the correct criteria in considering whether Dr. Houser's opinion was documented. The DOL explained what constitutes a reasoned and documented opinion in the preamble to the revised regulations, and stated that "[a]s for defining the necessary documentation, [20 C.F.R.] §718.104(a) sets forth the basic requirements for any report of physical examination obtained in connection with a claim for black lung benefits, and subsection (b) accommodates any testing the physician may consider useful." 65 Fed. Reg. 79948 (Dec. 20, 2000). Pursuant to 20 C.F.R. §718.104:

> (a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the Office or in a manner containing substantially the same information. Any such report shall include the following information and test results:
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> (1) The miner's medical and employment history;
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> (2) All manifestations of chronic respiratory disease;
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> (3) Any pertinent findings not specifically listed on the form;
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> (4) If heart disease secondary to lung disease is found, all symptoms and significant findings;
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> (5) The results of a chest X-ray conducted and interpreted as required by § 718.102;
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> (6) The results of a pulmonary function test conducted and reported as required by §718.103. . . .
>
> (b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as an electrocardiogram, blood-gas studies conducted and reported, as required by §718.105.

[9] Claimant points out that neither Dr. Rosenberg nor Dr. Zaldivar disputed the basic premise in Dr. Houser's report, that the right lung contributes 55 percent of total lung capacity and the left lung contributes 45 percent.

20 C.F.R. §718.104(a), (b). On remand, we instruct the administrative law judge to consider Dr. Houser's opinion in light of 20 C.F.R. §718.104, in determining whether his opinion is documented.

We also conclude that the administrative law judge erred by not applying the same critical analysis to Dr. Rosenberg's opinion as she applied to Dr. Houser's report. Dr. Rosenberg opined that claimant "most likely" suffered a phrenic nerve injury, as a complication of the bypass surgery performed in 1999. Employer's Exhibit 4. He stated that "this damaged phrenic nerve resulted in a nonfunctional or poorly functional right diaphragm." *Id*. Dr. Rosenberg specifically challenged Dr. Houser's opinion, noting that claimant's "degree of restriction is actually consistent with what has been reported in the medical literature regarding unilateral diaphragmatic paralysis and resultant impairment (Elefteriades)."[10] As claimant points out, although the administrative law judge concluded that Dr. Rosenberg's opinion was more credible, based on his reference to this one medical article, the administrative law judge did not consider whether the article was relevant to the facts of this case. Dr. Houser explained that claimant had been diagnosed with an elevated diaphragm and that he had less impairment in pulmonary function than that which would be caused by a paralyzed diaphragm.[11] Dr. Rosenberg did not diagnose diaphragm paralysis and stated that claimant had either a "non-functional or poorly functional" right diaphragm, nevertheless, he relied on medical literature discussing a paralyzed diaphragm to support his opinion. On remand, the administrative law judge should reconsider the credibility of these opinions. Employer's Exhibit 4.

We also agree with claimant, that the administrative law judge erred in failing to consider, as she did with Dr. Zaldivar, whether Dr. Rosenberg based his medical conclusions in this case on general assumptions that are inconsistent with the views of the DOL in revising the regulations. In addressing the etiology of claimant's restrictive respiratory impairment, Dr. Rosenberg stated that, "[w]hile there is no question that restriction can be caused by clinical CWP, it would be expected to be associated with extensive interstitial opacities and the likely presence of progressive massive fibrosis (PMF)." Employer's Exhibit 4. Dr. Rosenberg added, "[w]ith respect to [claimant], one can appreciate during the time span between the time of Dr. Gaziano's evaluation in 1984 and those of other examiners (Drs. Rasmussen, Zaldivar and Crisalli) after 1999, he had no progression of his interstitial opacities; consequently, specific to [claimant] it is not logical to conclude that his restriction was related to CWP." *Id*.

[10] Dr. Rosenberg's citation was to "Elefteriades J. et al. Unilateral diaphragm paralysis: etiology, impact, and natural history. J. Cardiovasc. Surg. (Torino) 49:289-95, 2008." Employer's Exhibit 4.

[11] Claimant asserts that there is no evidence that he suffered a phrenic nerve injury, as suggested by Dr. Rosenberg, or that his diaphragm is paralyzed.

Dr. Rosenberg's medical conclusions in this case are based on the faulty premise that it is "illogical" to attribute claimant's restriction to coal dust exposure in the absence of any progression of claimant's interstitial opacities on x-ray to the degree of progressive fibrosis/complicated pneumoconiosis. Contrary to Dr. Rosenberg's opinion, the DOL has concluded that a miner may have low radiographic profusions for simple clinical pneumoconiosis, but still be disabled by restrictive or obstructive respiratory impairment arising from his coal dust exposure.

> [I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant impairment after a latent period. Because the legal definition of "pneumoconiosis" includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke is particularly significant.

65 Fed. Reg. 799972 (Dec. 20, 2000). On remand, the administrative law judge must address whether Dr. Rosenberg's opinion is credible in light of his statements and medical studies relied upon by the DOL, as reflected in the comments to the revised regulations. *See Sewell Coal Co. v. Triplett*, 253 Fed.Appx. 274, 277, 2007 WL 3302366 **3 (4th Cir. Nov. 7, 2007) (unpub.); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Lastly, we vacate the administrative law judge's Decision and Order because she has not explained the basis for her credibility determinations in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[12] In weighing Dr. Rosenberg's opinion, the administrative law judge noted:

> Dr. Rosenberg stated that the [c]laimant demonstrated "preserved oxygenation in association with exercise" but it is unclear, from Dr. Rosenberg's opinion, whether this observation relates only to the period prior to 1999 or whether it also includes the [c]laimant's most recent testing. If the latter, then Dr. Rosenberg does not accurately recount Dr.

[12] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

> Rasmussen's exercise testing, which recorded no hypoxemia but which noted "significant ventilatory limitations to exercise."

Decision and Order at 26-27. Although the administrative law judge acknowledged that Dr. Rosenberg's opinion was "unclear," she nonetheless assigned his opinion controlling weight, without further explanation, noting only that she found his opinion reasoned and documented, in light of the objective studies.[13] *Id*. at 26. Because the administrative law judge has not properly evaluated whether Dr. Rosenberg's opinion is credible,[14] her cursory explanation for according his opinion controlling weight does not satisfy the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On remand, the administrative law judge must reweigh the opinions of Drs. Houser and Rosenberg and determine whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant may satisfy his burden of proof if he can prove that pneumoconiosis has had a "material adverse effect on [his] respiratory or pulmonary condition" or that it has "materially worsen[ed] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1).

In weighing the conflicting medical opinions, the administrative law judge must explain her credibility determinations in light of the comparative credentials of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See* 20

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[13] Because the administrative law judge specifically rejected Dr. Zaldivar's opinion, for failing to address Dr. Rasmussen's finding of a significant ventilatory limitation to exercise, she must address on remand whether Dr. Rosenberg's opinion is similarly flawed.

[14] Dr. Rosenberg determined that claimant's diffusing capacity was normal and concluded that, if claimant's restriction were due to pneumoconiosis, he would also have a low diffusing capacity. Employer's Exhibit 4. The administrative law judge noted that Dr. Rasmussen reported a minimally reduced diffusion capacity, and Dr. Zaldivar reported a low diffusion capacity. Decision and Order at 10, 21; Director's Exhibit 10; Employer's Exhibit 5. In addition, Dr. Houser noted a moderate diffusion impairment and the pulmonary function studies obtained by Drs. Rasmussen, Zaldivar and Crisalli reported minimally and moderately reduced diffusion capacities. Director's Exhibits 10, 12; Claimant's Exhibit 4; Employer's Exhibit 3. We agree with claimant that since Dr. Rosenberg was the only doctor to diagnose a normal diffusion capacity, the administrative law judge must consider the weight to accord Dr. Rosenberg's opinion in light of the diffusion capacity evidence.

C.F.R. §718.104(d)(5); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002). The administrative law judge must also explain the bases for all of her findings of fact and conclusions of law as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and her Decision and Order on Reconsideration are affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge